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Via E-filing

April 2, 2008

Hon Ann K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re STB Finance Docket No 35106
*United States Department Of Energy – Rail
Construction And Operation – Caliente Line In
Lincoln, Nye, And Esmeralda Counties, Nevada*

Dear Secretary Quinlan

Enclosed for filing on behalf of the State of Nevada in the above-captioned docket is the *State Of Nevada's Motion To Reject DOE's Application, or alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement*

The motion is presented in both original and PDF version in WORD format for iMac

The motion reflects the correct document and service dates Counsel has been served by U S Mail and by e-mail by agreement

Expedited consideration of this motion is requested

Please acknowledge receipt. Thank you

Yours truly,
/s/
Paul H Lamboley

PHL/nd
Enc.

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35106

**UNITED STATES DEPARTMENT OF ENERGY – RAIL
CONSTRUCTION AND OPERATION – CALIENTE LINE IN
LINCOLN, NYE, AND ESMERALDA COUNTIES, NEVADA**

**STATE OF NEVADA'S MOTION TO REJECT DOE's APPLICATION,
or alternatively, TO REQUIRE RESPONSIVE COMMENTS ONLY AFTER
APPLICATION HAS BEEN FULLY COMPLETED BY PROPER SUPPLEMENT**

EXPEDITED CONSIDERATION REQUESTED

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March 31, 2008

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I

Motion

The State of Nevada ("Nevada") moves the Board to reject as incomplete the application of the United States Department of Energy ("DOE") filed March 17, 2008 seeking prior approval from the Board under provisions of 49 U.S.C. §10901 for the proposed construction and operation of a 300-mile rail line, commonly known as the Caliente route, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada.

The proposed transaction would extend the national rail system into Nevada for the purposes of transporting more than 70,000 metric tons of spent nuclear fuel ("SNF") and high level radioactive waste ("HLW") over a period of 50 years from various origins throughout the United States to a destination which is the first of its kind in the world, the proposed geologic nuclear waste repository at Yucca Mountain, NV

Rejection of DOE's application is urged on the grounds and for the reasons that the application fails to comply with several requirements of the Board's Regulations, principally (a) Part 1150 – *Certificate to Construct, Acquire, or Operate Railroad Lines*, 49 C.F.R. §§1150.1-10 (Applications Under 49 U.S.C. 10901) by failure to include operational data and operating plan *Exhibit D*, 49 C.F.R. §1150.5, and (b) Part 1105 – *Procedures for Implementation of Environmental Laws*, 49 C.F.R. §§1105.1 *et seq.* by failure to include sufficiently complete environmental information and data, *Exhibit H*, 49 C.F.R. §1150.7

Additionally, although an application for construction under 49 U.S.C. §10901, not consolidation under §11323, the full nature and scope of DOE's proposed transaction should require compliance with provisions in Part 1106 – *Procedures for Surface*

Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, as it qualifies as a “transaction” under 49 C.F.R. §1106.2 for which an SIP should be deemed necessary safety information by the Board in its consideration of the application for authority to construct and operate the line for the proposed transportation at issue

Similarly, DOE’s application is largely devoid of meaningful consideration of potential terrorism attacks on the proposed transportation activity and infrastructure, and related security and first-response concerns. Terrorism and sabotage concerns prompted Congress to enact “*Implementing Recommendations of the 9/11 Commission Act of 2007*”, P.L. 110-53, 121 Stat. 266 (August 3, 2007) and responsible administrations within the Department of Transportation (“DOT”) and the Department of Homeland Security (“DHS”), in coordinated proceedings, to propose new security regulations for rail shipments of hazardous materials including spent nuclear fuel. These shared concerns should have prompted DOE to reasonably anticipate that meaningful consideration of terrorism would be necessary supportive information under 49 C.F.R. §1150.8 and required for the Board’s evaluation of this application.

Alternatively, in the event the Board chooses not to reject DOE’s application as presently filed for the reasons urged, but rather to require that DOE supplement its application, Nevada moves the Board to require that responsive pleading to the application be filed *only after* the DOE application has been fully completed by proper supplementary content.

Such an alternative procedure will not impair the rights of applicant but rather will permit stakeholders and interested parties to file appropriately complete responsive

comments. It will avoid the need for serial filing of supplementary pleadings by responding commenters as well as supplementary replies by applicant.

In short, requiring DOE's full compliance with regulations governing an application under §10901 will promote the efficient review of a unique transaction, whose effects and impacts are not limited to Nevada but will involve the entire national rail system.

II

Discussion Supporting Motion

A. Nevada's Interest

The State of Nevada, acting through the Nevada Attorney General and the Agency for Nuclear Projects, is responsible to safeguard and protect the public health, safety and environment of its citizens from the potential adverse consequences or impacts of nuclear projects within the State, and specifically the waste repository project proposed for Yucca Mountain ("YMP") and related transportation activities. Nevada is responsible for the public health and safety of Nevada employees, and also other workers within the state, especially those that may be adversely impacted by YMP-related activity. Most importantly, Nevada is responsible as trustee to protect the groundwater resources held by the state in trust from any adverse consequences resulting from a project such as YMP.

For the purposes of proceedings on the DOE application, Nevada is a stakeholder and an interested party, and acknowledges service of the application by DOE.

Nevada's standing is undisputed regarding YMP-related proceedings. Nevada has previously participated, and continues to participate, as a party in proceedings before the

Environmental Protection Agency (“EPA”), the Nuclear Regulatory Commission (“NRC”), and DOE. Nevada has also participated as a party in judicial review proceedings before the United States Courts of Appeals.

B. Jurisdiction

The DOE application invokes the Board’s jurisdiction under provisions of 49 U.S.C. §10901 and applicable regulations

In its application, DOE necessarily acknowledges that by implementing a “Shared-Use Option” (“SUO”) the proposed transaction will result in the construction and operation of a line of “railroad” in interstate commerce, and will involve “transportation by rail carrier” subject the Board’s primary, if not exclusive, jurisdiction under 40 U.S.C. § 10501, as those terms are defined in 49 U.S.C. §10102.

Doubtlessly, DOE’s application seeks the benefit of federal preemption under the Interstate Commerce Act, as amended, 49 U.S.C. §§10101 *et seq* , and the jurisdiction of the Surface Transportation Board (“STB”). However, DOE’s application may be more doubtful than definite as it relates to STB jurisdiction.

DOE’s application and supporting submissions are equivocal on implementation of the “Shared-Use Option” – which remains more a contingency than a commitment. See *Application*, pp 5-6, 9-10, 15-16, 28-30 (SUO identified as a “preferred alternative”); *Exhibit H*, Draft Rail Corridor SEIS (DSEIS) and Draft Rail Alignment EIS (DEIS), p S-40 (designs in implementing alternatives “could allow”/“would accommodate” SUO), p. 2-7, §2.2.2 (construction/operation “could provide” for SUO), pp. 2-108-113, §2.2.6 (each implementing alternative “would allow” SUO) and, p. 6-3, §6.2 (“If DOE selected

[SUO] as part of the *Proposed Action*” then STB jurisdiction would attach)(Italics added); see also *Exhibits K and M*.

While DOE describes SUO everywhere with “could/would” potential, nowhere in its application does DOE commit or state unequivocally that SUO will in fact be implemented.

Indeed, DOE’s application expressly reserves decision not only whether to implement the SUO but whether to even construct and operate the line for which prior approval is being sought, stating:

“The DOE anticipates that the Final Rail Alignment EIS will be issued in June 2008. The Final Rail Alignment EIS will assist DOE in deciding whether to construct and operate a railroad, and if so, within which corridor and alignment. The Final Rail Alignment EIS will also assist DOE in deciding whether to implement the Share-Use Option. These decisions will not be made until DOE issues the Final Rail Alignment EIS and a record of decision.”

Application, p. 10. Obviously, the FEIS and ROD are not expected for several months.

Significantly, DOE makes this application as a non-carrier, but fails to identify the operator that will provide rail service on the line or perform the common carrier function for purposes of 49 U.S.C §11101, stating “An operator has not been selected at the time of this application.” See *Id* , p. 34.

How then, if at all, will the SUO be implemented? And if determinative DOE decisions are yet to be made, when should STB jurisdiction properly attach?

C. Cause for Rejection.

Nevada urges that DOE’s application be rejected as incomplete for failure to comply with Board regulations, principal of which are those that require the application to include (a) operational data and operating plan *Exhibit D*, 49 C.F.R §1150 5, and (b)

sufficiently complete environmental information and data, *Exhibit H*, 49 C.F.R. §1150.7 and §§1105.1 *et seq.*.

Nevada also argues that, notwithstanding its §10901 premise, the application is incomplete as it fails to include a safety integration plan (“SIP”) under Part 1106, and also fails to address potential terrorism aimed at the transportation activities and infrastructure proposed in Nevada and nationwide which information would be consistent with §1150.8 as necessary for the Board’s full evaluation of this application.

In sum, Nevada asserts the DOE application fails to properly include basic elements essential to the Board’s critical review and evaluation of the proposed transaction for which the Board’s prior approval is not only appropriate but also statutorily required.

**1. Failure to Provide Operational Data and Operating Plan, Exhibit D
- 49 C.F.R. §1150.5**

On its face, DOE’s application admittedly fails to properly include operating data and operating plan, *Exhibit D*, as required by 49 C.F.R. §1150.5. See *Application*, p. 34.

In its application, DOE attempts to excuse this failure away by offering that “an operator for the rail line has not been selected at the time of this application” but “once an operator has been selected, an operating plan would be developed”. *Id.*

For application *Exhibit D*, Operating Plan, DOE merely states: “Not Applicable at this time”.

DOE has neither sought a waiver under §1150.10 nor provided justification in its application for the failure to provide an operating plan.

DOE has had almost 20 years since the 1987 Nuclear Waste Policy Act Amendments (NWPAA), to anticipate the operating data and plan requirements for this

application. But rather, in a rush to meet its self-imposed timetable to file this application with the Board coincident with a license application with the NCR in June, 2008, DOE failed to timely develop a plan to include in this application.

The failure to include an operating plan compromises full disclosure of essential information which has been the continuing bane of stakeholders regarding DOE's proposed rail transportation activity and infrastructure in Nevada. Previously, DOE has refused to commit to implementing the "Shared-Use Option". Even now, DOE's refusal to clearly do so in its application is evidenced by not submitting an operating plan to the Board. That failure is fatal and should result in rejection of the application.

When appearing before the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") in 2005, DOE resisted Nevada's claim that STB jurisdiction and review should apply to the proposed transportation activity and infrastructure based on DOE's repetitious references to an SUO. See *State of Nevada v Department of Energy*, 457 F.3d 78 (DC Cir. 2006). In that case, Nevada's claim was deemed "unripe because it is speculative". The Court found that "STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier", and accepted DOE's indecision, stating: "That decision, however, has not been made." Additionally, Nevada's claim that "STB consultation" was required was deemed waived.

DOE's failure to include an operating plan confirms the continuing doubt of its "shared-use, common carrier service" intentions, and ensures the need for subsequent piecemeal proceedings on this issue. The significance of DOE's failure to include an operating plan should not be underestimated.

2. Failure to Provide Sufficiently Complete Environmental Information and Data, Exhibit H – 49 C.F.R. §1150.7

Despite assertions by Nevada and other stakeholders that shared-use, common carrier service over the proposed line to be constructed in Nevada triggers primary, if not exclusive, STB jurisdiction over the proposed transportation transaction for all purposes, especially the environmental documentation required under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq* (“NEPA”), DOE has consistently refused to commit to “shared-use, common carrier service” over the line. Consequently, vague and incomplete as this application is, DOE has nevertheless acknowledged Board jurisdiction, on that issue

Faced with Nevada’s continuing assertions of STB jurisdiction and special expertise, and especially that it be the “lead agency” for transportation-related environmental documentation under NEPA, DOE finally included the STB as a “cooperating agency” in DOE’s own undertaking of required but incomplete NEPA environmental documentation. Notably, DOE did not similarly include the Federal Railroad Administration (“FRA”) as a “cooperating agency”, which likewise has jurisdictional interests and special expertise for rail safety.

Board regulations require sufficiently complete environmental information and data, Exhibit H, under 49 C.F.R. §§1150.7 and 1105.1 *et seq*. In its application, DOE includes its own Draft Nevada Rail Corridor Supplementary Environmental Impact Statement (“RC-DSEIS”) and Draft Rail Alignment Environmental Impact Statement (“RA-DEIS”) as environmental analysis and documentation, *Exhibit H*. The application proposes that the RC-DSEIS and RA-DEIS be adopted by the Board to support STB’s “fulfillment of its responsibilities under the National Environmental Policy Act, (NEPA).

as well as under the Board's regulations (49 C.F.R. Parts 1105 and 1150)." *Application*, p. 3.

Notwithstanding the STB's participation as a "cooperating agency" in DOE's undertaking of required RC-DSEIS and RA-DEIS environmental analysis and documentation, that NEPA process is nonetheless incomplete and does not satisfy the STB's own NEPA responsibilities. The STB may consider the DOE submissions for reference material but is not obligated to accept let alone adopt the RC-DSEIS or RA-DEIS. To avoid duplication, the Board may utilize DOE documents in combination with its own environmental analysis and documentation in order to fulfill its NEPA requirements. See 10 C.F.R. §§1506.3 and 4; and 49 C.F.R. Part 1105.

As previously noted in this motion, the RC-DSEIS and RA-DEIS are, by DOE's own admission, incomplete and indefinite, both in terms of content and decisions. *Supra*, pp. 6-7. So much so, these submissions cannot satisfy the requirements of 49 C.F.R. §1150.7 and Part 1105 for this application.

For example, Part 1105 regulations that address additional NEPA environmental documentation in line construction cases require a detailed operating plan, which is here omitted. 49 C.F.R. §1105.7(11)(iii). Those plan requirements are similar to those contained in §1150.5, *Exhibit D*, for applications under 49 U.S.C. §10901.

Apart from the incompleteness, indefiniteness, omissions and non-acceptability of the RC-DSEIS and RA-DEIS, relative to the criteria normally applied by the STB in environmental analysis and documentation for the transportation transaction such as DOE here proposes for §10901 evaluation, the real question now is: how does the STB intend

to proceed to fulfill its own NEPA responsibilities under Part 1105 should it choose to accept DOE's application as presently filed?

The STB must decide and declare what Part 1105 NEPA procedures will apply going forward, and specifically what will be RC-DSEIS and RA-DEIS status in those procedures.¹

3. Failure to Provide Safety Integration Plan (SIP) – 49 C.F.R. §1106

The transportation transaction proposed by DOE for the transport of SNF and HLW will result in a 300-mile extension of the national rail system and necessarily involve the operations of several other carriers, both within and without Nevada. Review and approval of the proposed transaction requires an adequate and coordinated consideration by the Board and the Federal Railroad Administration ("FRA") for integration of operating safety procedures among the national rail carriers and a presently unidentified rail carrier operative for DOE over the Nevada line.

DOE's application is silent on the issue and fails to provide a SIP for a proposal that qualifies as a "transaction" under as that term is defined in 49 C.F.R. §1106.2 for which an SIP can and should be deemed necessary by the Board for a proper consideration of the application for authority to construct and operate the line in question.

¹ Comments on the RC-DSEIS and RA-DEIS by the many interested parties, and specifically those of Nevada, filed with DOE evidence numerous, serious omissions and deficiencies. At the very least, DOE should have included the same as a part of *Exhibit H* in order to make full disclosure and provide more complete environmental information. All of which bears directly on STB's future determination whether, and if so to what extent, to adopt DOE's documentation under 40 C.F.R. §1506.3 as it proceeds to satisfy and create the record for its own environmental analysis and documentation under Part 1105.

While Part 1106 generally applies to consolidations under 49 U.S.C. §11323 not construction under §10901, 49 C.F.R. §1106.2 makes clear the requirement is not so limited, but in appropriate cases may be applied to other requests for transaction authority, such as here.

4. Failure to Address Terrorism Relative to Rail Transportation and Infrastructure

Following September 11, 2001, Congress enacted measures that address national concerns for terrorism attacks on transportation activity and infrastructure. One of significance is the *"Implementing Recommendations of the 9/11 Commission Act of 2007"*, P.L. 110-53 121 Stat. 266 (August 3, 2007), Titles XII, XIII and XV Subtitles A, B and D. These concerns also prompted responsible administrations within DOT and DHS to undertake rulemakings proposing new security regulations for rail shipments of hazardous materials, including spent nuclear fuel.

DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), in consultation with the FRA, and DHS's Transportation Security Administration ("TSA"), in coordinated, companion proceedings, proposed new security regulations for rail shipments of hazardous materials, including spent nuclear fuel, for 49 C.F.R. Parts 172 and 174, and 49 C.F.R. Parts 1520 and 1580, respectively. The notices of proposed rulemakings (NPRMs) are at 71 FR 76834 and 76852 (December 21, 2006), respectively. [The proposed rules are currently under review at OMB and are expected to become effective within the next 45 - 180 days.]

Unquestionably, Congress, DOT and DHS have very genuine and specific concerns about the security of rail shipments of hazardous materials, including spent nuclear fuel, through major urban areas. Currently proposed rulemakings are designed to

address these concerns, among others, through route selection decisions based on security risk assessments, that have been exacerbated by rail capacity constraints within and without Nevada.

DOE's application fails to address the full implications of the revised rail transportation safety and security regulations proposed by PIIMSA and TSA. DOE's *Exhibit H* identifies potential rail and barge-to-rail routes to YMP through more than 30 of the nation's largest metropolitan areas, including New York, Philadelphia, Washington, DC, Atlanta, Detroit, Chicago, Houston and Los Angeles, not to overlook the proximity of YMP activity to Las Vegas.

DOE repeatedly underestimates the transportation terrorism risks that DOE has chosen to evaluate, and ignores more severe transportation terrorism risks identified by the State of Nevada and other parties. Nevada has addressed these issues in detail in the written comments on the RC-DSEIS and RA-DEIS submitted to DOE on January 10, 2008

An act of terrorism or sabotage that completely perforates the shipping cask containment, or deployment of a combination of weapons specifically designed to breach, damage, and disperse the cask contents, could result in consequences many times more severe than those evaluated by DOE, with radiation exposure to thousands and clean-up costs in the billions.

The circumstances in this case surely heighten terrorism concerns because the proposed transportation activity and infrastructure involves the relatively exposed rail transport of substantial amounts of SNF and HLW not only in Nevada but also from origins nationwide to Nevada

DOE's *Exhibit I*, at page 30, offers comment on anti-terrorism as a reason for the repository, but does not address terrorism as it relates to national or Nevada transportation activity or infrastructure. Nor does it do so in its efforts at debunking transportation myths. *Id.* at 38. Other references in DOE's submissions do not present a meaningful analysis or consideration of terrorism.

Finally, it is important to note that the United States Court of Appeals for the Ninth Circuit ("9th Circuit") recently rejected NRC's 4-factor rationale for excluding meaningful consideration of terrorism from its NEPA environmental analysis and documentation. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert denied* 127 S.Ct. 1124 (2007)

Meaningful consideration of these concerns are largely absent from DOE's application but should have been reasonably anticipated as necessary supportive information under 49 C.F.R. §1150.8 required for Board consideration of this application. The failure to critically address terrorism as it relates to transportation activity and infrastructure, and related security, exposure and first response concerns should be considered fatal to the acceptance of DOE's application as presently filed.

III

Conclusion

As noted, the geologic repository for spent nuclear fuel and high level radioactive waste proposed for Yucca Mountain, NV is a unique, first-ever in the world, project. For the Board, DOE's application involving local and national transport of such hazardous materials is likewise unique.

DOE's application seeks prior approval from the Board for the construction and operation of a 300-mile rail line in Nevada as an extension of the national rail system for the transportation of SNF and HLW from origins throughout the United States to the repository. While the application focuses on construction and operation of rail infrastructure in Nevada, it necessarily implicates rail transportation and infrastructure nationwide.

This case represents the first invitation and opportunity for the STB to review and evaluate the local and national impacts of proposed transportation activity and infrastructure related to the proposed repository. For that reason, the Board should require that DOE's initial application fully comply with applicable rules and regulations

Nevada finds DOE's application filed March 17, 2008 deficient, and for the reasons urged, requests the Board to reject the application as incomplete. If the Board chooses not to reject the application but to require DOE to appropriately supplement its application, then Nevada requests that the Board require responsive comments be filed *only after* DOE's application has been fully completed with proper supplementary content

Dated this 31st day of March 2008.

_____/s/_____
Paul H. Lamboley, for
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record and others identified below by (1) first-class U S. mail, postage prepaid, to all and (2) e-mail as shown, this 2nd day of April, 2008

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